SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 474

MARION W. STEMBRIDGE,

Petitioner,

vs.

THE STATE OF GEORGIA,

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA AND THE SUPREME COURT OF GEORGIA

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BRIEF OF PLAINTIFF IN CERTIORARI

Federal Questions 2 and 3. There are three Federal Questions in petitioner's case. Petitioner insists on Federal Questions 2 and 3 but he has already discussed these questions in his brief as petitioner for certiorari and he will not discuss them further in this Brief.

Discussion of Federal Question 1

Federal Question 1. (R. 208) Is the procuring of a conviction in petitioner's case, by the suppression and withholding by the State of evidence that would have resulted in a verdict of *not guilty* (pars. 4 and 6 of the affidavit of each of ten trial jurors R. 185-197) and by the use of evidence known to be perjury, a violation of the due process clause of the 14th Amendment to the Constitution of the United States?

1. The conviction could not have been obtained except by the use of this perjured testimony of Mary Jane Harrison

that petitioner had followed Emma Johnekins back into the *third* room of the apartment and shot her while she was sitting on a trunk (pars. 4 and 6 of the affidavit of each of ten trial jurors. R. 185-197).

2. THE DELIBERATE SUPPRESSION AND WITHHOLDING (FROM THE TRIAL COURT AND FROM THE TRIAL JURY) OF EVIDENCE THAT WOULD HAVE SHOWN DEFENDANT *Not Guilty* IS A VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE CONSTITUTION.

This Court has passed on this point (the withholding of evidence that would have shown defendant *not guilty*) many times in connection with the knowing use of perjured *testimony* (typical cases are: *Mooney* v. *Holohan*, 294 U. S. 103; *Pyle* v. *Kans.*, 317 U. S. 213) and has in every case held that the due process clause of the 14th Amendment to the Constitution was violated; but this Court has never passed on this one point by itself.

There is in petitioner's case mathematical proof that evidence that would have shown petitioner *not guilty* was deliberately suppressed and withheld from the trial court and from the trial jury and petitioner respectfully submits that the public interest would be served if this Court should rule on this point by itself in this case.

The planned suppression and withholding (from the trial court and from the trial jury), of evidence that would have shown defendant *not guilty* is the deliberate, planned, deception by the State of the trial court and of the trial jury. It is just as much a knowing deception of the court as is the knowing use of perjured testimony. It is the deliberate giving to the trial court and to the trial jury of a false and deceptive picture of the case, and of the whole truth of the case. It is the knowing, conscious, planned, deceiving of the court and the knowing, conscious, planned, attempt by the State to defraud the defendant of his in-

herent right—the right to be tried by the truth in his case and by all of the truth in his case. It violates the basic concepts of justice and the basic concepts on which America is founded. Doing this, it is inescapably a violation of the due process clause of the 14th Amendment.

Too, it should be remembered that the deliberate suppression and withholding of evidence that would have shown the defendant *not guilty* is always an offense against an innocent person, while the knowing use of perjured testimony is an offense against one who could be guilty.

There is still before this Court the question of whether this evidence (the dying declaration of Mary Jane Harrison) was deliberately withheld.

a. This evidence existed (R. 103 last par. thru 104 par. 4) and was in the hands of the State at the time of the trial. (R. 104 pars. 4 and 5).

b. Petitioner demanded this evidence (R. 103, par. 7 "if that statement is [was] made, Mr. Jones, I would like very much to have it in court tomorrow where we could get this thing cleared up"), tho under Georgia law petitioner had no legal right to demand it. (There is no discovery in Georgia Criminal law.)

c. Tho petitioner demanded this evidence, this evidence was suppressed and withheld from petitioner and from the trial court and from the trial jury.

d. Under the circumstances present in this case, the suppression and withholding of this evidence could not have been accidental. This evidence must necessarily have been withheld as the result of an intention to withhold it.

Evidence that would have shown petitioner *not guilty* was deliberately suppressed and withheld in petitioner's case.

The deliberate suppression and withholding of evidence that would have shown defendant *not guilty* is a violation of the due process clause of the 14th Amendment.

A conviction obtained in violation of the due process clause of the 14th Amendment is absolutely and totally void (*Norris* v. *Ala.*, 294 U. S. 587; *Hill* v. *Texas*, 316 U. S. 400), and this Supreme Court should void the judgment of the trial court on this one point by itself, even tho there were no other violations of petitioner's Constitutional rights in petitioner's case.

3. The knowing use of perjured testimony is a violation of the due process clause of the 14th Amendment to the Constitution of the United States.

This question is so well settled that it needs no discussion. (Typical authorities are: *Mooney* v. *Holohan*, 294 U. S. 103; *Pyle* v. *Kans.*, 317 U. S. 213.)

So, the only question before this Court is a question of fact: (a) Was this testimony perjured testimony?; and (b) Was this perjured testimony knowingly used?

a. Was this testimony perjured testimony? The very best evidence in the world, as to whether this testimony was perjured, is the affidavits of ten of the trial jurors. These jurors were set up as jurors by the State; they were drawn by the State to serve as jurors at this trial court; they have already been accepted by the State to pass on *this* case. No attempt whatever has ever been made by the State to question in any way or manner the validity, the justice, or the truth of these affidavits of these ten jurors, and none of these could now be questioned.

These jurors knew the case; they knew personally all of the parties and witnesses in the case; they knew the circumstances and the background.

Each of these ten jurors swears that the dying declaration of Mary Jane Harrison showed to him that petitioner

was *not guilty*—in other words, that the testimony of Mary Jane Harrison on the witness stand that petitioner followed Emma Johnekins back into the *third* room of the apartment and there shot her was perjury. This testimony was perjured testimony.

b. Was this perjured testimony knowingly used—did the State know at the time of its use that this testimony was perjured?

In matters such as this there is no way to apply to the parties any exterior tests that could give us the right answer. There is no machine that could give us the right answer. There is no chemical test that could give us the right answer. But the law does not require either of these. The law requires only that we get the reasonable, logical, sensible, human, answer.

At the time that the State sent Mary Jane Harrison to the witness stand to swear that petitioner followed Emma Johnekins back into the *third* room and there shot her while she was sitting on a trunk, the State had in its files the sworn dying declaration of this same Mary Jane Harrison, and in two separate, distinct, and unrelated places of which dying declaration Mary Jane Harrison had sworn that petitioner had *never* gone into any room of the apartment except the *first* room. This dying declaration was taken by the State's investigator, it was sworn to and was given by Mary Jane Harrison for the purpose of being used in court in the trial of this case, so that the State could not have failed to know that one of her statements was perjury.

Ten members of the trial jury, familiar with the circumstances of this case, each swears that of the two sworn diametrically opposite statements of Mary Jane Harrison, her testimony before them on the witness stand was the perjured testimony. So, the only question is: Did the State

know as much about the case as the members of the jury knew? The answer to that is: The State always knows more about a case than the jury knows.

The State's attorney lives in this county (of fewer than 15,000 people) and he knows all of the parties and the witnesses even better than the jury knows them. The State could never plead stuporousness on the part of the State's attorney in this case. His perception is extraordinarily high.

The State knew that the dying declaration was given while Mary Jane Harrison felt that she was in the article of death. The State knew that there was a great deal of perjury in this case—there was far too much swearing to diametrically opposite statements. The State knew that this dying declaration was given before anyone had an opportunity to see Mary Jane Harrison and tell her what to swear to (and this is most important).

Even if we should leave out the dying declaration in the State's possession at the time, all of the other factors in the case; the eternal rightness of things; the eternal fitness of things, all showed to the State, and could not have failed to show to the State that the testimony that petitioner had followed Emma Johnekins back into the *third* room of the apartment and there shot her while she was sitting on a trunk, was perjury.

There is another truth that petitioner should place before this Court. During the past five years every case of the State's attorney involved in this case, that has been appealed to the Supreme Court of Georgia, has carried with it a charge of unfair, prejudicial, and illegal handling of the case by this State's attorney. (*Smith* v. *State*, 204 Ga. 184; *McAffee* v. *State*, 205 Ga. 545; *Joyner* v. *State*, 208 Ga. 435.) Other typical cases carrying this same charge are: *Harris* v. *State*, 183 Ga. 106; *Gunnells* v. *State*, 199 Ga. 486.

This testimony was perjured testimony and was knowingly used by the State.

A conviction obtained by the knowing use of perjured testimony is a violation of the due process clause of the 14th Amendment and such a conviction is absolutely and totally void (*Norris* v. *Ala.*, 294, U. S. 587; *Hill* v. *Texas*, 316 U. S., 400) and petitioner respectfully submits that it is the obligation of this Supreme Court to void the judgment of the trial court on this one point alone even tho there were no other violations of petitioner's rights guaranteed (*Hill* v. *Texas*, 316 U. S. 400) to him by the Constitution. (*Shelley* v. *Kraemer*, 334 U. S. 1.)

Respectfully submitted,

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